NO. 83-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

V.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING AFFIRMANCE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America respectfully requests leave to file the attached brief of amicus curiae and would show the Court as follows:

1. *Identity of Amicus Curiae:* The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. It is located on the campus of the South Texas College of Law in Houston and shares certain activities and personnel with the law school. LFA has expertise in matters of economics and public policy. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, academics and businesspeople.

2. *Interest of Amicus Curiae:* Among LFA's principal aims are the improvement of the use of the market system of resource allocation and removal of unreasonable regulation. LFA has participated as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in the courts of the several states, in pursuit of these goals. It has supported reliance on the market or has attempted to enhance the

efficiency of regulation in such diverse industries as broadcasting, health care, natural gas production, mining, insurance, and commercial lending.

3. Desirability of an Amicus Curiae Brief: The decision under review offers the potential of procompetitive benefits in one of the most fundamental markets in our economy, the capital market. The legitimacy of that decision depends in turn upon the interpretation of statutes and, hence, the discerning of legislative intent, as well as upon a review of the decision in its economic context. LFA's activities in regulatory cases have frequently required it to consider interpretation of statutes. LFA is in a position to do so from a perspective different from that of the parties, i.e., a perspective of public policy. Furthermore, LFA's expertise in the application of law to economic matters makes it likely that LFA can assist the Court in fully developing the issues in this regard. Although the parties are clearly represented by capable and diligent counsel, their perspectives on the case make it unlikely that all such issues will be developed in the absence of amicus curiae briefing.

4. Necessity of Motion; Refusal of Consent by Petitioner Securities Industry Association: Movant timely requested consent of the parties. This motion is necessary because of the refusal of consent by one party, Petitioner SIA.

FOR THESE REASONS, the Legal Foundation of America moves for leave to file the attached brief of amicus curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Paragraphs 1 and 2 of the Motion for Leave preceding this Brief are adopted at this point as showing the interest of amicus curiae.

SUMMARY OF ARGUMENT

This amicus curiae brief deals primarily with Glass-Steagall Act issues. Although some of the statutory construction arguments herein are also applicable to the Bank Holding Company Act, the latter is not our primary focus. Amicus has attempted to avoid unnecessary duplication of Respondents' arguments, though we agree with those arguments and wish to express support for them.

I.

Petitioner SIA uses statutory construction principles erroneously in this case. For example, it begins its brief by citing

remarks made in one committee of Congress nearly 50 years after passage of the Glass-Steagall Act. The use of isolated remarks to construe legislation is not appropriate. Neither is the use of statements in one legislature to construe another Congress' intent. What Petitioner SIA really seeks by this argument is to create a kind of "legislative veto" based on isolated remarks from one committee of the Congress.

II.

There are several traditional techniques for determining legislative intent. When the traditional approaches are applied in this case, the conclusion is overwhelming that the Board's action should be affirmed. The opinion of the Court of Appeals correctly applies these traditional criteria.

III.

The Board's actions here do not offend any of the purposes of the legislation in question. On the contrary, the Board's action effectuates the repeatedly expressed congressional policy in favor of competition and efficiency.

ARGUMENT AND AUTHORITIES

I. TRADITIONAL PRINCIPLES OF STATUTORY CONSTRUCTION SUPPORT THE BOARD'S DECISION AND CONTRADICT SIA'S ARGUMENTS.

A. Petitioner SIA's Statutory Construction Arguments are Erroneous.

1. Petitioner SIA seeks a kind of "legislative veto" based on remarks in one committee of Congress. SIA begins its argument by citing remarks lifted from the report of one committee in the current Congress.[1] It asserts that the committee was opposed to

1 Brief of Petitioner at 6. The committee directed its remarks to the Federal Home Loan Bank Board, which is a separate entity with

the action at issue here (although it in fact addressed a different agency altogether). SIA's argument is ironic, in that this Court has rejected the "one house" legislative veto. *INS v. Chadha*, 103 S. Ct. 2764 (1983). If SIA should succeed in this argument, it would not only thus reinstate the legislative veto, but would extend it to a single committee.

2. *Petitioner SIA's argument that "Congress watched in frustration" is erroneous and misleading, particularly since SIA omits to mention substantial support for the Board's action.* SIA's argument that Congress "watched in frustration" ignores the fact that a majority of Congress need never "watch in frustration" in a case such as this one, because a one-sentence enactment would have cured the frustration if it existed.[2] SIA reaches its odd conclusion by presenting random remarks by a minority of members as though they were the universal conviction of a monolithic Congress.[3] In doing so, SIA omits the views of current members who are undecided, those who are leaning but not

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separate responsibilities from the Federal Reserve Board. In any event, such remarks are not a proper means of construing legislation.

2 "Although a subsequent legislature has power to change an Act to achieve whatever prospective meaning or effect it desires, it has been held that the views of members of subsequent legislatures as to the meaning of Acts passed by previous legislatures are not entitled to much weight." 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 222 (3d ed. 1973), citing United States v. Philadelphia National Bank, 374 U. S. 321 (1963).

3 Petitioner's approach might be compared with W. STATSKY, HOW TO USE STATUTES AND REGULATIONS 21 (1975):

> What is a legislature? . . . [I]t is an organization of hundreds of individuals within two units (e.g., House and Senate) . . . . [I]t can safely be said that not every individual had the same objective, the same intent or intention. Some members of the legislature may have been only vaguely familiar with [the issue].

"Committees rarely speak with a single thought, with a single consistent objective." J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL 241 (1975). "A legislative act emerges from the hubbub of legislative struggle." Id.

committed, and those in the substantial number who supported the Board's action here. [4]

3. SIA's use of remarks in one Congress, to interpret a statute passed by another Congress nearly fifty years earlier, is inappropriate. Legislation results when a consensus is forged. The fact of consensus, and the process by which it is reached, are important to our system of legislation. [5] Thus *contemporaneous* [6] statements of legislative intent, producing or expressing consensus, are appropriate aids to statutory interpretation. But chance minority remarks by members of another legislature fifty years later, which did not go through the process of reaching consensus, are not useful. [7] This Court has had occasion to explain the danger in interpreting one Congress's legislation by remarks in another Congress, [8] and SIA's efforts to do so here are equally inappropriate.

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4 It is submitted that, in fact, SIA's implication of substantial opposition in the current Congress is not supportable. But amicus curiae does not rely upon either that conclusion or the conclusion that Congress would have favored the Board's action, because use of remarks in the current Congress to interpret legislation by another Congress is inappropriate.

5 See generally INS v. Chadha, supra ("legislative veto" contravenes requirement of passage by both houses, coupled with Presidential signature, contemplated by Constitution). The concurring opinion of Mr. Justice Powell pointed out that such legislative action may also infringe on the judicial power by effecting an adjudication upon a statute, and this analysis, too, is applicable here.

6 See 2A SUTHERLAND, supra note 2, at 233 (emphasizing requirement that interpretation be "contemporaneous" to be relevant); DAVIES, supra note 3, at 262 ("Interpretations of statutes contemporaneous with their passage are relevant guides to later interpretation").

7 See note 2 supra and authorities therein cited.

8 E.g., United States v. Philadelphia National Bank, 374 U. S. 321 (1963); see also 2A SUTHERLAND, supra note 2, at 222.

4. Congress emphatically intended the Federal Reserve Board (which is bipartisan and is composed largely of appointees of prior administrations) to act independently of short-term political remarks in the Congress. If there is anything that is crystal clear about the Federal Reserve Board, it is that it is an *independent* agency.[9] Congress sought to insulate it from short-term politics.[10] SIA's effort to use remarks by a few members of Congress to affect the legality of this independent Board's actions is squarely in violation of this important Congressional policy. Furthermore, SIA's implication that the Board's action is a radical departure neglects the fact that the Board is bipartisan by custom and is now composed almost entirely of members who were initially appointed by previous administrations, as it was at the time of this decision.[11]

B. The Board's Interpretation of the Legislation is Supported by Traditionally Accepted Criteria for Determining Congressional Intent.

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9 Federal Reserve Act, 12 U. S. C. sec. 221 (1976).

10 See, e.g., Cong. Rec. 169-179 (1913).

11 The membership of the Board of Governors, just before this decision, was as follows:

FEDERAL RESERVE SYSTEM GOVERNORS
(Seven members appointed for 14-year terms; no statutory limitation on political party membership.)

	Party:	Term Expires:	Confirmed:
Paul A. Volcker (C)	D	1/31/92	8/2/79
Nancy H. Teeters	D	1/31/84	9/15/78
J. Charles Partee	I	1/31/86	12/19/75
Henry C. Wallich	R	1/31/88	6/12/79
Emmett J. Rice	D	1/31/90	6/12/79
Lyle E. Gramley	D	1/31/94	5/15/80
Preston Martin	R	1/31/96	3/31/82

1982 CONGRESSIONAL QUARTERLY ALMANAC 20-A.

Traditional factors for determining legislative intent include: [12] (1) historical events preceding the legislation; [13] (2) ascertainable remedial purposes; [14] (3) contemporaneous expressions of legislative intent by legislators; (4) similar constructions of words in a series (the *ejusdem generis* doctrine); [15] (5) omission from one section of a word used in other section (the *expressio unius, exclusio alterius* principle); [16] (6) deference to the expertise of an administrative agency in construing the statute it

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12 See generally 2A SUTHERLAND, supra note 2, Pt. V (A) ("Statutory Interpretation: Principles and Policies"); STATSKY, supra note 3, Pt. II ("The Techniques of Legislative Analysis"); DAVIES, supra note 3, ch. 13. ("Statutory Interpretation"). While the principles and factors listed here are not exhaustive, they are the approaches that are most clearly applicable.

13 The clear historical event underlying the Glass-Steagall Act, for example, was the instability of the national banking system, which culminated in a banking holiday declared by the President in the year of passage of the Act (1933). Since, as the Board and Court of Appeals held, the kind of acquisition in question in this case has none of the potential for instability displayed by the events to which Glass-Steagall was directed, this factor supports the Board's interpretation. Cf. Investment Co. Institute v. Camp, 401 U. S. 617, 629 (1971) ("ICI I").

14 The three purposes identified with Glass-Steagall (maintaining stability, encouraging public confidence, and preserving disinterested investment advice; see note 26 infra and accompanying text) are not affected by the kind of acquisition at issue, as the Board and the Court of Appeals correctly held.

15 Thus the term "public sale" in the list of activities prohibited bank affiliates may be interpreted as ejusdem generis ("of the same species") with the other words in the series "issue, flotation, underwriting, public sale, or distribution . . . ." in the Glass-Steagall Act, section 20.

16 Thus section 20, which applies to bank affiliates, omits to prohibit "the business of dealing in securities and stock," which is prohibited to banks themselves by section 16. Since banks and bank affiliates are differently treated, and since the prohibition omitted from one section is contained in another only four sections removed, the omission is particularly conspicuous.

is charged with administering; [17] (7) common usage of the word in the trade that is regulated; [18] (8) previous constructions of the terms by the courts; and (9) policy (such as the policy favoring competition). [19]

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17 Only a few days before the filing of this Brief, this honorable Supreme Court reaffirmed this principle:

> [O]n an issue that implicates its expertise . . . , a reasonable construction by the Board is entitled to considerable deference . . . . The question for decision today is thus narrowed to whether the Board's application of [the statute at issue] is reasonable.

NLRB v. City Disposal Systems, Inc., ____ U. S. L. W. ____ (U. S. S. Ct., Mar. 21, 1984).

The Federal Reserve Board's determinations are entitled not just to "considerable" deference, but to "the greatest" deference. Board of Governors v. Investment Co. Institute, 450 U. S. 46 (1981) ("ICI II"). The Court has explained this standard as follows:

> Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated judgment in all its phases, I think their judgment should be conclusive on any matter which, like this one, is open to reasonable difference of opinion.

Board of Governors v. Agnew, 329 U. S. 441 (1947).

18 "The general rule is that in the absence of a manifested legislative intent to the contrary or other overriding evidence of a different meaning, commercial terms when used in a statute relating to trade or commerce are presumed to have been used in their trade or commercial meaning." 2A SUTHERLAND, supra note 2, at 155. "Public sale" thus means underwritten sale.

19 "[T]he tendency of the courts has always been to favor interpretations which are consistent with public policy." 2A SUTHERLAND, supra note 2, at 401. In fact, most rules of strict or liberal construction "are founded on considerations having to do with policy one way or another." Id. Policy expressed in other statutes is relevant. Id. at 403-04. The policy favoring competition is to be found in many statutes that are appropriately read together with Glass-Steagall. See Part II of this Brief, infra.

The opinion of the Second Circuit considers all of these factors and correctly concludes that they support the Board's interpretation.[20] Petitioner SIA, on the other hand, misapplies these doctrines. It uses non-contemporaneous statements.[21] It divorces contemporaneous legislative statements from their context and from their remedial purpose.[22]

Furthermore, SIA misuses the doctrine of *in pari materia*. This doctrine, which requires that separately enacted legislation be construed so as to produce coherent regulation,[23] is used by SIA in an effort to make bank affiliates (governed by section 20 of Glass-Steagall) be regulated identically to banks (governed by section 16). This approach is erroneous, first, because identical

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20 See notes 12-19 supra and accompanying text.

21 See notes 2, 5-8 supra and accompanying text.

22 For example, Petitioner's Brief at 20-21 relies heavily upon remarks of Representative Koppleman, to the effect that "[t]he unholy alliance between the brokerage office and the banks must be broken." 77 Cong. Rec. 3907 (May 22, 1933). Petitioner fails to point out, however, that at the time, banks were allowed to speculate in securities and underwrite securities. The concern was with these kinds of bank activities, because they threatened stability, lessened public confidence, or interfered with disinterestedness in investment advice by banks, and not with disinterested brokerage.

Thus, Rep. Koppleman juxtaposed the quoted remarks with statements that the Act would prevent "diversion of banking funds into speculative operations;" that it would force bankers to give "impartial" advice; and that it would forbid bankers to "promote" or "underwrite" stocks. Id. Koppleman's remarks closed as follows:

> This provision will drive the speculator from the inner councils of the banks. It will restore the honest banker to the position of dignity and prestige, to which his character and ability entitle him. [Applause].

Id. In context, the remarks of Rep. Koppleman are clearly concerned with unstable investment practices, public confidence, and disinterested advice, and the remarks can only be represented as applying to discount brokerage if the context is ignored.

23 See, e.g., 2A SUTHERLAND, supra note 2, ch. 51.

treatment of banks and bank holding companies is not logically required and indeed is contrary to the thrust both of Glass-Steagall and of the Bank Holding Company Act.[24] Secondly, since the two sections are part of one act, rather than appearing in diverse acts that must be reconciled, the appropriate principle is not the *in pari materia doctrine* but rather the *expressio unius, exclusio alterius* principle. The omission from one section of language that appears in another section a few lines away in the same statute is a strong indication that it was intended to be omitted.[25]

II. THE BOARD'S ACTION FOSTERS COMPETITION AND EFFICIENCY, AND THUS IT CARRIES OUT A FREQUENTLY EXPRESSED CONGRESSIONAL PURPOSE.

The Glass-Steagall Act seeks to preserve the stability of bank assets, protect public confidence in banking, and prevent conflicts of interest in investment advice.[26] None of those purposes would be carried out by reversing the Board here.[27]

Since that is the case, it is relevant to consider that the Congressional policy in favor of fostering competition and efficiency is advanced by the Board's actions. This policy is expressed in

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24 "In both the Glass-Steagall Act itself and in the Bank Holding Company Act, Congress indicated that a bank affiliate may engage in activities that would be impermissible for the bank itself." Board of Governors v. Investment Co. Institute, 450 U. S. 46, 64 (1981) ("ICI II").

25 See note 16 supra and accompanying text.

26 See Clark, Judicial Interpretation of Glass-Steagall: The Need for Legislative Action, 92 BANKING L. J. 721, 725 (1980).

27 The simplest way to state the reason is that Schwab's brokerage is brokerage only, with no equity interest in the sales and no investment advice.

such general enactments as the antitrust laws, and it is also expressed in such banking industry enactments as the Bank Holding Company Act.[28]

SIA is engaged in a comprehensive effort to exclude competition and protect inefficient operations from it. The historical monopolization of odd-lot trading,[29] "bundling" by full-line brokers,[30] internal and external exchange regulation, and resistance to discount brokerage[31] are a part of this effort, as are litigation initiatives such as the present one.

The Board's action will make discount brokerage more readily available. This conclusion is overwhelmingly supported by the evidence. By reducing the cost of brokerage, the Board's action will reduce a major impediment preventing equity funds from shifting, when necessary, seek out the best investments. The Board's action will thus make capital markets function more efficiently, allocate resources better, and reduce transaction costs, in accordance with the congressional policy of competition.

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28 As to the antitrust laws, see, e.g., 1 E. KITNER, THE ANTITRUST LAWS 1-6 (1980); as to the Bank Holding Company Act, see 28 U. S. C. sec. 1843 (c) (8) (1976) (explicitly requiring assessment of "competition" and "efficiency" in the present case).

29 Cf. Eisen v. Carlisle & Jacquelin, 417 U. S. 156 (1974) (reporting district court finding of monopolization preliminary to class certification, rev'd on other grounds).

30 Until the advent of discount brokerage, it was not possible to obtain brokerage unassociated with other services for which the customer would have to pay whether he wanted them or not, because they were sold as a "bundle." One of the procompetitive effects found by the Board here is that it may promote efficient "unbundling" by full-line brokers.

31 Discount brokerage is a surprisingly recent development, having been initiated in the mid-1970's.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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